No. 4080.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Comes now The United States of America, by its attorneys, and respectfully petitions the Court for a rehearing on the 16 causes of action, as to which the judgment of the District Court was affirmed, for the following reasons:

I.

The decision of this Court is based upon the theory that while many errors were committed by the trial Court, to wit:

(*a*) In overruling plaintiff's demurrer to defendant's so-called affirmative defense;

(*b*) In refusing to grant plaintiff's motion to strike this so-called affirmative defense from the answer; and

(*c*) In admitting in evidence, over plaintiff's objection, a large amount of irrelevant testi-

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> mony, covering nearly 200 pages of the printed Record (the entire testimony totaling 256 pages),

none of them were prejudicial to the Government, for the reason "that the verdict of the jury was necessarily based" on some little indefinite, negative testimony introduced by defendant, and that the jury could not have been influenced, or misled, by defendant's successful efforts to inject into the case such a great mass of irrelevant testimony.

II.

But in its opinion the Court has overlooked the fact—

> (*a*) That so much irrelevant testimony was introduced, that, even if it stood alone, its effect upon the jury could not have been entirely removed;
>
> (*b*) That such irrelevant, sympathetic testimony actually misled the lower Court;
>
> (*c*) That the lower Court, being misled by such testimony, further aggravated the situation by its statements or rulings during the progress of the trial and in charging the jury;
>
> (*d*) That such irrelevant testimony had the earmarks of a prearranged plan to becloud the issues and mislead the Court and jury;
>
> (*e*) That such testimony had the effect of opening the door to irrelevant, sympathetic, and prejudicial arguments;
>
> (*f*) That the Government was not a party to the many manifest errors, both of omission

and commission, and should not suffer as a result thereof;

(*g*) That the defendant should not be allowed to profit by its own actions or conduct, even if we assume that it was ignorant of the law, especially as laid down by this Court in that other Northern Pacific case, 287 Fed., 780, or that it did not intend to becloud the issues; and

(*h*) That, considering the above and many other angles of the case, the Record does not justify the finding of an unknown quantity, to wit, that the jury was not misled or influenced by the large amount of woefully misleading testimony, especially in view of the fact that the trial Court itself was misled.

NECESSITY FOR SUIT.

In view of the fact that defendant successfully injected into this case a lot of so-called strike evidence, in order to raise or create a sympathetic issue for prejudicial purposes, there is no impropriety in saying, that so far as this case is concerned, defendant deserves no sympathy.

It was not the policy of the Government to ask a carrier to do the impossible during the so-called outlaw strike; the Government only required a carrier to do all that it possibly could in the interest of safety; but this defendant, while repairing what cars it could, only aggravated a bad condition, and undoubtedly largely increased the number of defective cars, by its method of operation.

There was no necessity for commingling damaged cars with good-order cars in commercial service; the former are always a menace to the latter, and in many instances may be so defective as to become extremely perilous to employees and passengers and other trains.

Then, to further increase the dangers, defendant put defective logging cars into good-order commercial trains, also logging cars loaded with logs liable to shift, as defendant itself admitted, before they were moved ten feet.

Cars loaded with shifting logs are always a menace, and Congress saw the necessity of providing a means whereby carriers could operate such dangerous instrumentalities without endangering the lives of employees and possibly passengers on other trains; and with that in mind Congress excluded from the provisions of the Safety Appliance Act certain cars hauled in trains engaged exclusively in logging service. (Section 6, as amended.)

ARGUMENT.

In the absence of any irrelevant, sympathetic so-called strike testimony, thus eliminating any argument or instructions based thereon, no fair-minded jury would have decided that the 16 cars in question were not defective as alleged.

Were the Government not absolutely sure of its ground in this respect, we would be somewhat reluctant to make such a broad assertion; but, candidly, in order to enable this Court to arrive at a just

appreciation of the fact that defendant's evidence with respect to the actual condition of the 16 cars was practically nil, we feel the necessity, in fairness to this Court, of calling its attention to certain phases of the case which it has inadvertently overlooked.

GOVERNMENT'S POSITIVE TESTIMONY.

In order that the Court may realize the strength of the Government's evidence as to the condition of the 16 cars, we direct attention to a résumé of the testimony with respect to the first cause of action which is typical of the remaining causes of action.

Inspector Winter, of the Interstate Commerce Commission, testified (Rec. 38–40, 69)—

> That on August 31, 1922, he made an inspection in the Northern Pacific yards at Auburn, Washington, on which day he inspected, among others, N. P. flat car 67219, loaded with logs;
>
> That he first inspected this car on track No. 6, in the train yard, opposite the yard office, at about 9.15 in the morning, and that the handhold on the right-hand side of the "B" end of the car was bent in against the end sill, so that it had no clearance;
>
> That he saw this car hauled from Auburn at 10.20 that morning in train Extra South, engine 1263, at which time it was still defective;
>
> That at the time this train left Auburn the defective car was coupled in between N. P. flat car 67476 and car No. 62296; and

That he made a detailed record of what he saw at the time of the transactions or inspections.

Inspector Weeks, also of the Interstate Commerce Commission, testified (Rec. 121, 122)—

That he was with Mr. Winter when the several inspections were made;

That he made a personal record of what he personally saw; concurrently made with each transaction;

That when he first saw N. P. flat car 67219 that morning, "it had a handhold bent on the 'B' end, bent in against the sill opposite the lever, with no clearance";

That he saw this car leave in train Extra South, engine 1263, in the same defective condition.

With the exception of the defective condition of the car in question, most of the above evidence found corroboration in defendant's own records, its wheel report. (Ex. A 3.)

DEFENDANT'S NEGATIVE TESTIMONY.

The evidence of any actual inspection of the cars hauled from Auburn was practically nil. But giving the defendant the benefit of every doubt, let us very briefly review this evidence.

On August 31, 1922, defendant had at Auburn, according to one witness (Rec. 250), three men who inspected cars in the daytime; according to a second witness (Rec. 257), four to six men; and, according to defendant's mechanical superintendent (Rec. 205), fifteen to twenty inspectors.

But the record shows that for some unexplainable reason defendant only cared to use three of them as witnesses—Allmain, Burnham, and Crawford; and here is their testimony in a nutshell:

> When two of these men inspected a train, which was the practice, one would go down one side of the train, the other on the opposite side. (Rec. 253, 259.)
>
> It was impossible for any man to inspect all trains, as some of them left so close together. (Rec. 257.)
>
> Neither of these three inspectors could say that he inspected any particular train at any time, except that Burnham, who began work at Auburn July 25th, said that he inspected train 930 for three weeks. (Rec. 246, 252, 257.)

Therefore it is apparent that *if* any of the three witnesses who worked at Auburn actually inspected any of the trains involved in this case, *he only inspected the appliances on his side of the train.*

So the inspection of the appliances by defendant's *one witness* was extremely problematical, for Auburn was a busy terminal, especially in the morning, when the trains in question left there, as 2,500 cars a day moved in and out of Auburn. (Rec. 199, 200.)

RECONCILIATION OF POSITIVE AND NEGATIVE EVIDENCE.

It will thus be seen that the jury could only reconcile this testimony (even if we assume that one inspector of defendant might have inspected any car in question) by finding that the cars were

defective as alleged. For by so holding, the jury would simply be finding that the Government inspectors and defendant's one inspector testified to the truth, and that, in the case of the latter, he simply overlooked the defect, IF he inspected the car.

But, on the other hand, to hold that the cars were not defective would be, in effect, to find that the Government inspectors perjured themselves.

We do not mean by that that the Government inspectors are infallible, for they may have overlooked other defective cars, just as the one inspector for defendant, if he inspected any car in question, overlooked the defects complained of.

The testimony of the Government inspectors was too certain, to definite and positive to be the result of a mistake, and, being corroborated in part by defendant's records, was not susceptible of being misconstrued by the jury as reflecting a mistake in each instance; for if the Government inspectors saw other cars with defective appliances it would be a most peculiar coincidence or mistake that of the several million cars in the United States, they happened to write down, in each instance, the initials and numbers of three cars (the car in question and the cars to which it was coupled) that happened to be in that particular train.

All these facts, we believe, were inadvertently overlooked by this Court; and in justice to the Court, the Government, and the Government inspectors, we have felt in duty bound to request a rehearing and a reconsideration of the finding "that the verdict of

the jury was necessarily based on the defense that no cars with penalty defects were hauled by the defendant in error over its line as charged."

On the other hand, further to emphasize the picture put before the eyes of the jury through the large amount of irrelevant, sympathetic testimony, we would, as briefly as possible, refer the Court to some of the outstanding features of this testimony.

IRRELEVANT, SYMPATHETIC, PREJUDICIAL TESTIMONY.

We urgently request the Court to review this character of testimony, as set forth in the Government's Assignments of Error 13 to 26 (Rec. 329–341), which for the sake of convenience we herewith summarize. This evidence relates to—

Unusual burden at Centralia.

Acts of strikers or sympathizers in cutting air hose or knocking off grab irons after a train was made up at Auburn and Centralia.

Acts of strikers or sympathizers in cutting air hose, damaging angle cocks, and otherwise rendering equipment defective at Tacoma and Ellensburg, as well as Auburn and Centralia.

Act of cutting 22 air hose in one train.

Air hose being filled with waste; also steam hose.

Necessity for setting refrigerator cars on steam tracks to keep them from being filled up with waste.

Question of endurance so far as company concerned.

Everybody working constitutional limit.

Every nerve strained.

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Insufficiency of men at Auburn to repair log cars hauled from there in train 930, which cars were not involved in this case.

Reason of Northern Pacific for not employing new men until about July 18th.

Danger of repairing cars on transfer or interchange track in Seattle (18th count).

Train crews trying to bluff officials about cars being defective, and being particular about taking out trains with defects.

Condition of car 67105 (8th count) when it left Auburn.

Efforts to employ men at Auburn.

Unreasonableness of making repairs on transfer or interchange track in Seattle (18th count).

Critical attitude of trainmen, and acts of brakemen in crawling under trains to find defects.

Interference from outsiders; and great deal of interference from people in employ of defendant.

Intention of trainmen to delay trains.

Other Brotherhoods doing everything to help strikers.

Malicious acts of unknown persons, in disconnecting uncoupling levers, pulling apart or cutting air hose, in bending off stirrups (sill steps), and opening angle cocks to prevent getting full air pressure, and in doing other acts of sabotage.

Treatment of officials by train crews.

Critical condition at Centralia.

Inability to get men at Centralia account reputation of I. W. W. center.

We do not feel that it is proper for us to refer to defendant's arguments to the jury, but, frankly, it is our belief that the court may very well consider how wide the door was opened to sympathetic, prejudicial argument by reason of the character of the above testimony.

Now, in the opinion of this Court, we find the following statement relating to this irrelevant testimony:

> The consideration of testimony relating to conditions arising from the strike was expressly limited by the Court to the single question whether Centralia, Tacoma, and Auburn were available repair points during the period in question.

But such limitation, based on facts which had misled the Court, also misled the jury, for it suggested a right on defendant's part that it might haul defective cars from these points. But the trial Court overlooked the fact, just as this Court has, that Tacoma was not involved in this suit; that no defective car had been discovered at Centralia, or that it was being hauled therefrom for the purpose of being repaired; and that no evidence had been introduced by defendant to show, or even suggest, that it could not replace a small hand-brake wheel at Auburn.

But such express limitation could not possibly have the effect of pushing the water back over the dam, of clearing the minds of the jury of all false impressions, of all false issues; for, as we shall show,

the trial Court itself was misled by defendant's irrelevant testimony, and thereafter by its instructions impressed upon the jury's mind the Court's misconception of the issues.

TRIAL COURT MISLED BY TESTIMONY.

In convincing this Court that the trial Court was misled by the irrelevant testimony, and that as a result thereof it inadvertently misled the jury, we desire, first, to refer to the 18th cause of action.

In its opinion in this case this Court says:

> Under the law defendant in error was forbidden to haul this car over its line any distance for any purpose, because the defect arose on the lines of another carrier.

This was the rule laid down by this Court in that other Northern Pacific case, 287 Fed. 780, which was decided long before the trial of the instant case, and it is no impropriety in saying that the trial Court's attention was called to this decision at the trial of the instant case.

Now, the trial Court would not have refused to follow the law as laid down by this Court had it not been misled by the irrelevant strike testimony, and in that connection we respectfully request this Court to note the attitude of defendant as to this cause of action.

Defendant introduced evidence to the effect that by reason of the strike a man's life would be in danger if he endeavored to repair the 18th count car on the interchange track, thus attempting to convey the

impression that had it not been for the strike this car would have been repaired before defendant moved it from this interchange track. This was most unfair, both to the Court and jury, and we can not escape the conviction that it was merely intended for sympathetic, prejudicial purposes; for after the Court below had been so misled as to direct a verdict on this 18th cause of action, and after such action had undoubtedly impressed itself on the minds of the jury, defendant came before this Court and, in effect, admitted that all the evidence about a man's life being in danger if he attempted to repair the car on the interchange track was wholly irrelevant and untrue, so far as his ever being required to do that work on the interchange track at any time. Therefore we regretfully, but unhesitatingly, again say that such testimony was intended only to mislead the Court and jury and to prejudice the Government in the eyes of the jury by the suggestion that the Government, in instituting and prosecuting this case, was insisting that the defendant should jeopardize the lives of men by requiring them to repair such a car on the interchange track.

And in defendant's brief, page 48, we find support of our statement, as follows:

> The railway company, as a matter of law, could not have used this interchange track so located in a public street for repair purposes. Such purpose would be entirely inconsistent with its franchise grant and with the rights of the public to a joint use of the street.

This is followed on the next page by the statement that the trial Court would have stultified itself and the law had it not directed a verdict for defendant on this 18th cause of action.

It will thus be seen that the trial Court was woefully misled by defendant's evidence and suggestion, that by reason of the strike this interchange track had ceased to be a repair point, whereas it never had been and never would be.

The action of the trial Court in directing a verdict on this 18th cause of action undoubtedly had a strong effect on the jury, for the jury could not escape the conviction that the Court laid great stress on, and emphasized by its action, this irrelevant strike testimony.

We desire to give a few more instances of how the trial Court and jury were misled by defendant's irrelevant testimony.

The witness Weeks was asked the following question on cross-examination by defendant (Rec. 161):

> Isn't it a fact that your attention was called to the fact that in the Centralia yard, the Auburn yard, and other yards of the Northern Pacific, after a train was made up and defects were repaired, either the strikers or sympathizers with the strikers would come along, cut the air hose, and knock off grabirons?

The Court overruled the Government's objections to this question, and added (Rec. 162):

> The strike would have something to do with the nearest available repair point. It might

> be considered by the jury as to whether the cars might not have been put out of order after the inspection before the train left the station.

Now, this had no reference to any cause of action; the answer of defendant simply denied that any car left Auburn or Centralia in the defective condition alleged; and there was not the slightest suggestion that any of the cars involved in the instant case were put out of order by strikers or sympathizers.

But the Court, undoubtedly assuming at that stage of the trial that such evidence might be introduced later on as to some of the cars in question, required the witness to answer the same, revamped by counsel as follows (Rec. 163):

> You have testified that you had learned that there was a strike down at Centralia; I will ask you if your attention was not called, both at Centralia and Auburn—and if you were in the Tacoma yard, and in the Ellensburg Northern Pacific yard, and in Spokane—that after trains had been made up and the road engine had been attached, either the strikers or their sympathizers came along and cut the air hose, damaged the angle cocks, and otherwise attempted to render the equipment defective?

And the witness replied that he had heard such tales.

But thereafter defendant introduced no such evidence as to any car involved in this case; but the

trial Court, overlooking this fact, instructed the jury as follows (Rec. 308):

> If the inspection is made with a reasonable time before the train leaves and the company—the defendant—has no reason to apprehend that there is any movement of the train or that it is subjected to any condition that is going to put it out of repair after inspection before it has left, *if mischievous individuals for any reason after that inspection* inflict defects or damage upon the cars that result in penalty defects, the company would not be liable, * * *.

And all through the Court's instructions we find repeated references to defendant's right to haul the cars in question from Auburn and Centralia, provided they could not be repaired at those places; but this was all wrong.

So far as Centralia is concerned, no car in question was discovered to be defective at that point, and no car was being hauled from there for the purpose of being repaired.

As to cars hauled from Auburn, not a single one was being hauled for the purpose of repairing any defect complained of by the Government; and only in one instance was it claimed that a car had to be hauled from Auburn in order to repair some defects other than those complained of, but whether or not these other defects were penalty defects we do not know.

And so, with the above situation in mind, and with the further thought that the nearly 200 pages of

irrelevant strike testimony had beclouded the material facts supporting the real issues in the case, it was error for the Court, even inadvertently, to intensify this fogginess by certain instructions.

It was error for the Court to charge the jury that it might take the—

> strike in account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective * * * and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points, and it would not be a violation of this law to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great. (Rec. 298.)

It was also error for the Court to give the jury the following instructions:

> After the inspection, if it is made a reasonable time before the departure of the train, the train should be considered as upon the line, and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired,

> then to take them to the nearest available repair point and remedy the defects. (Rec. 309.)

The effect of this erroneous instruction can readily be seen, and particularly its fertility for sympathetic, prejudicial arguments based on irrelevant testimony.

It was error to refuse to charge the jury as follows, and the Court would no doubt have so charged had it not been misled by the testimony:

> If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

The above was plaintiff's Request for Instructions No. 5, which the Court refused to give, *as requested;* for while the above words were used in instructing the jury, they were qualified and their effect destroyed by these words added thereto:

> * * * unless moved for the purpose of being repaired, as I have explained to you. (Rec. 300.)

It was error and misleading for the Court also to charge the jury—

> that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving and in determining the *disputed* questions of fact in this case [the existence of the defects to the cars in question] *that you have a right to take in consideration the surrounding circumstances*

and conditions as they existed at the times alleged in the complaint herein so far as the same have been established by the evidence. (Rec. 307.)

These "surrounding circumstances" included the strike and the withdrawal of certain employees from the service.

ASSIGNMENTS OF ERROR.

All of the above were assigned as error.

And in connection with the question of fact relating to the existence of the defects in question, we would call the Court's attention to certain other Assignments of Error based on the exclusion of evidence offered by the Government and discussed in its brief; and as an example thereof, consider the 13th cause of action, discussed on page 70 (e) thereof.

CONCLUSION.

It is respectfully submitted that in view of the irrelevant testimony, and the Court's instructions, which resulted in a verdict, unsupported by any material, relevant testimony, a rehearing should be granted the plaintiff in error on the 16 causes of action as to which the judgment of the lower Court was affirmed.

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DISTRICT OF COLUMBIA, *ss:*

M. C. List, being first duly sworn, deposes and says: That he is one of the attorneys of record for the plaintiff in error in the above entitled cause, and that he hereby certifies that, in his judgment, this petition for rehearing is well founded, and that it is not filed for purposes of delay.

M. C. LIST.

Subscribed and sworn to before me this 28th day of December, 1923.

[SEAL.] A. HOLMEAD.